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Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 241.

HERMAN SNYDER

v.

THE COMMONWEALTH OF MASSACHUSETTS.

RESPONDENT'S BRIEF.

STATEMENT OF FACTS.

The facts surrounding the crime are summarized in the opinion of the Supreme Judicial Court of Massachusetts in the case of *Commonwealth* v. *Snyder*, 1933 Adv. Sh. 809, 810, appearing in the record on pages 25 to 28, inclusive.

The petitioner was indicted for murder on April 6, 1932 (Rec. p. 1). He was arraigned and pleaded not guilty on the same day (Rec. p. 2). On April 12, 1932, counsel was appointed for the defendant by the Court. The trial of the petitioner commenced on or about May 17, 1932, in the Superior Court of Middlesex County. After the impaneling of the jury, the Commonwealth moved that the jury take a view of the scene of the crime. Whether or not there shall be a view by a jury in a criminal case within the Commonwealth of Massachusetts rests within the sound discretion of the presiding justice. The authority to order such a view is contained in G.L. (Ter. Ed.) c. 234, §35, which reads as follows:

> "The court may, upon motion, allow the jury in a civil case to view the premises or place in question or

any property, matter or thing relative to the case if the party making the motion advances an amount sufficient to defray the expenses of the jury and the officers who attend them in taking the view, which shall be taxed as costs, if the party who advanced them prevails. The court may order a view by a jury impanelled to try a criminal case."

The petitioner filed a motion that he be allowed to be present in person at the view with the jury (Rec. p. 11). The Court denied this motion (Rec. p. 11), but intimated that if counsel desired to take the petitioner to the scene without the jury it could be arranged (Appendix 1 to petition). At no time during the trial did the petitioner attempt to avail himself of this offer. Counsel for the petitioner was present with the jury at the time of the taking of the view. The petitioner duly excepted to the refusal of the Court to permit him to attend in person the taking of the view by the jury. This exception was argued at great length and considered in detail by the Full Bench of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Opinion of the Court Below.

The opinion of the Supreme Judicial Court of Massachusetts in the case against the petitioner is reported in Massachusetts Advanced Sheets, 1933, 809; 185 N.E. 376. The portion of the opinion relevant to the issue in this proceeding reads as follows:

"4. The fifth assignment of error rests on exception nine and relates to all proceedings that occurred in relation to the view taken by the jury, the refusal to permit Snyder to be present, the denial of his written motion 'to attend view' and the order and direction to take a view in this defendant's absence, and alleges that this refusal was in violation of the constitutional rights

of the defendant under the Constitution of the United States and the Constitution of Massachusetts which guarantee the right of a defendant in capital cases to be present at all stages of the trial and face his accusers and to be present when testimony is offered against him. The decisions on the question relating to view in criminal cases are in conflict in other States. The cases recognizing the right of the accused to be present when such view is had do so chiefly on the ground that either it is a part of the trial, or, since the jury have the right to treat the information received during the view as evidence, the accused, under the Constitution, has a right to be confronted by the witnesses and therefore must be present. See note to *Noell* v. *Commonwealth* (135 Va. 600), 30 A.L.R. 1345, 1357, where the cases are reviewed; see also note to *People* v. *Thorn* (156 N. Y. 286), 42 L.R.A. 368. At common law, except upon an indictment for criminal nuisances, a view was not allowed in criminal cases 'without mutual consent.' *Commonwealth* v. *Handren,* 261 Mass. 294, 297. In this Commonwealth the judge by Rev. Sts. c. 137, §10, now G.L. (Ter. Ed.) c. 234, §35, was given authority to 'order a view by any jury empanelled to try a criminal case.' It is now settled that a view is not such a taking of evidence as violates the constitutional right of the defendant 'to meet the witnesses against him face to face.' *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 31. 3 Wigmore on Evidence (2d ed.) §1803. It is expressly decided in *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 31, that the defendant in a capital or other criminal case could waive whatever rights he had to accompany a jury on the view, and it was said that 'There are obvious practical objections to the contention that as matter of right a defendant in a criminal case may accompany the jury on a view. The whole subject rests in the sound discretion of the court.' It was decided in *Common-*

wealth v. *Belenski*, 276 Mass. 35, that the refusal in that case to permit the defendant to accompany the jury on a view was within the sound discretion of the trial judge, citing *Commonwealth* v. *Dascalakis*, 246 Mass. 12, 28-31. The defendant Snyder in support of his motion to be present at the view argued the broad ground of legal right to be present at all times during the course of the trial and thereby to acquaint his counsel with the facts thus secured which might be necessary to aid in his defence. The attorney for the defendant Donnellon in support of the motion said: 'In order for my client to understand and to see the things so that he can either disclaim or rebut the evidence presented against him, I want him in my presence to point out the things.' The judge said: 'I am not sure but that can be arranged.' Counsel for Donnellon then said: 'I do not care whether it is done in the presence of the jury.' The judge then decided it would not be for the best interest of any one to have the prisoners go with the jury but stated: 'On the other hand, I will consider the question as to whether or not an opportunity will be given you, if after going there you cannot understand the situation, to go there with your client alone, under proper supervision, provided, of course, that no comment is made by yourself in advance that any such thing would happen or any intimation given to the press. I will consider that and see what you decide after you go to the scene this morning.' After the view the request was not renewed. There is nothing in the record which discloses that the defendants were deprived of effective aid in the preparation and defence of their case that would have been afforded by their presence at the view. We see no error in the trial judge's refusal to grant the motion. The defendant's contention that the refusal to grant the motion is a violation of art. 14 of the Amendments to Constitution of the United

States in that it is a denial of 'effective aid in the preparation and trial of a capital case,' and therefore is a denial of due process of law, citing *Powell* v. *Alabama,* 287 U. S. 45, 52, 57, 58, is unsound, in that the chief purpose of a view is to enable the jury to understand better the testimony which has been or may be introduced, and because the view is not a part of the trial, it being suspended while the view is taken. *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 29-30. See *Commonwealth* v. *Slavski,* 245 Mass. 405, 413."

Issue.

The sole issue involved in this proceeding is whether or not the refusal of the justice presiding at the trial of the petitioner in the Superior Court for the County of Middlesex, Commonwealth of Massachusetts, to permit the petitioner to accompany the jury on a view of the premises where the crime took place constitutes a violation of any rights guaranteed to the petitioner by the Fourteenth Amendment to the Constitution of the United States.

Argument.

The Law of Massachusetts was Settled, Prior to the Petitioner's Case, that a Defendant has no Absolute Right to Accompany the Jury on a View.

The question whether or not a defendant in a criminal action has an absolute right to accompany the jury on a view to the scene of the crime was considered by the Supreme Judicial Court of Massachusetts in two cases decided prior to the arrest and trial of the petitioner. In the case of *Commonwealth* v. *Dascalakis,* 246 Mass. 12, the Court considered this matter fully. In that case both the defendant and the Commonwealth were represented by extremely able counsel. The portion of the decision relevant to the issue involved in these proceedings is as follows:

"The jury took a view of the place where it was alleged that the murder was committed and where the body of the person who was murdered was found. To permit a view was within the discretion of the court. *Commonwealth* v. *Chance*, 174 Mass. 245, 247.

"The defendant did not accompany the jury on the view. The judge well may have believed that the defendant waived his right to go on the view and have discredited the affidavit of the defendant to the contrary. *Commonwealth* v. *Russ*, 232 Mass. 58, 70.

"It is urged that, since it has been held that information gained by a jury on a view may be treated as evidence, *Tully* v. *Fitchburg Railroad*, 134 Mass. 499, *Smith* v. *Morse*, 148 Mass. 407, 410, *McMahon* v. *Lynn & Boston Railroad*, 191 Mass. 295, 299, therefore the defendant must be present at the view. The word 'view' expresses by its own natural signification its present meaning when used with reference to a trial in court. When a jury takes a view it goes to the place where the main event involved in the trial occurred in order that the jurors may inspect the land, the building, the machine or the other crucial thing about which will centre a considerable part of the testimony. Its chief purpose is to enable the jury to understand better the testimony which has or may be introduced. The essential features may be pointed out by the counsel. No witnesses are heard. The oath to the court officers having charge of a jury on a view is to the effect that no one shall be suffered to address the jury. There can be no comment or discussion. The jury can simply use their eyes. They can obtain information only through sight. One or two attorneys representing both the Commonwealth and the defendant go on the view, it being permissible to them, in the presence of each other and of the officers of the court, merely to point out to the jury 'marks, matters, and things,' but not otherwise to speak

to the jury. The things thus seen by the jurors could not well be banished from their minds. A view often dispenses with the necessity of detailed description by plan or word of mouth. Inevitably that which the jury see on a view will be utilized in reaching a verdict. In that sense that which is disclosed on a view is evidence. It is rightly described as such. Expressions to that effect are in numerous decisions. *Tully* v. *Fitchburg Railroad,* 134 Mass. 499. *Smith* v. *Morse,* 148 Mass. 407, 410. *Parks* v. *Boston,* 15 Pick. 198, 209. *McMahon* v. *Lynn & Boston Railroad,* 191 Mass. 295. In another more strict and narrow sense a view may be thought not to be evidence. Plainly it is not testimony. It is not given by witnesses. It is not offered in the presence of the judge presiding at the trial. In general, evidence in a jury trial can be given only in the presence of the judge, whose duty it is to be present and to be the directing mind over whatever goes on. The place of trial is not changed while the view is being taken. The trial is merely suspended. It is a part of the right of trial by jury as established by the law of this Commonwealth that each party is entitled to the assistance and protection of the judge throughout the trial. In this aspect the idea of testimony being presented in the absence of the presiding judge is in conflict with fundamental conceptions of trial by jury. *Whitney* v. *Wellesley & Boston Street Railway,* 197 Mass. 495, 502. *Opinion of the Justices,* 207 Mass. 606. *Posell* v. *Herscovitz,* 237 Mass. 513, 515. Moreover, things seen at a view cannot be witnesses in any accurate definition of that term. That which is disclosed by the organs of vision on a view by a jury is mute and generally inanimate. That in this strict sense the view is not in the same category as that commonly termed evidence is manifest from the fact that the practice is firmly established, in cases where otherwise that course ought to be followed, of

granting motions for new trials even though there has been a view, and of refusal by this court to deal with exceptions on the theory that the jury may have thus acquired material information not disclosed on the record. *Rigg* v. *Boston, Revere Beach & Lynn Railroad,* 158 Mass. 309. *Munroe* v. *Carlisle,* 176 Mass. 199. *Williams* v. *Citizens' Electric Street Railway,* 184 Mass. 437, 438. *Albright* v. *Sherer,* 223 Mass. 39.

"The practice in recent years in capital cases doubtless has been to inquire of the prisoner whether he desires to accompany a jury on the view. But the actual practice as disclosed by highly important capital trials has been that the whole subject has been treated as a function of the court. In *Commonwealth* v. *Webster,* 5 Cush. 295, the jury were sent on a view without any expression of desire on the part of the defendant and against the objection of his counsel. In *Commonwealth* v. *Knapp,* 9 Pick. 496, 515, the jury was taken on a view with the consent of the defendant. In neither case was anything said to the defendant by the court indicating that under any circumstances he could accompany them. It would be difficult to think of two capital cases tried by more able counsel or presided over by judges of greater learning or of higher passion for justice. They were both tried before the full court. See *Commonwealth* v. *Phelps,* 210 Mass. 78, 82. They must be taken in this respect to state the correct practice in this Commonwealth. The question whether a view should be taken was plainly decided after deliberation by the court. Although there is no discussion of this point in either of those decisions, it is unthinkable that any matter of fundamental right should have escaped the attention of the justices then composing the court.

"There are obvious practical objections to the contention that as matter of right a defendant in a criminal

case may accompany the jury on a view. The whole subject rests in the sound discretion of the court. That discretion commonly and wisely has been exercised so that the defendant in a criminal case does not accompany the jury on a view.

"Plainly whatever rights the defendant had could be waived by him. Apparently the judge found they were so waived in the case at bar. *Valdez* v. *United States,* 244 U. S. 432. *People* v. *Thorn,* 156 N. Y. 286. *State* v. *Slorah,* 118 Maine, 203, 215, 216. *Blythe* v. *State,* 47 Ohio St. 234. *State* v. *Suber,* 89 S. C. 100. *Shular* v. *State,* 105 Ind. 289. *State* v. *Congdon,* 14 R. I. 458.

"It follows that the constitutional right of the defendant 'to meet the witnesses against him face to face' was not violated. Declaration of Rights, Art. 12. *Commonwealth* v. *Slavski,* 245 Mass. 405.

"Here again the discretion of the trial judge would control on a motion for new trial because constitutional rights must be seasonably asserted even in criminal cases. *Lebowitch, petitioner,* 235 Mass. 357, 363.

"It follows from what has already been said that manifestly absence of the defendant from the view taken by the jury was no violation of G. L. c. 278, §6, to the effect that 'A person indicted for a felony shall not be tried unless he is personally present during the trial.' "

This question was again considered by the Supreme Judicial Court in the case of *Commonwealth* v. *Belenski,* 276 Mass. 35. In this case the Court reaffirmed the decision of the *Dascalakis* case:

"2. The next assignment of error relates to the refusal of the judge to permit the defendant to accompany the jury on the view. This refusal was within the sound discretion of the trial judge. The entire subject of a defendant's right to accompany a jury on a view was

fully considered in *Commonwealth* v. *Dascalakis*, 246 Mass. 12, 28-31. There was no error in this ruling."

The petitioner contends that the decision in the *Dascalakis* case, in so far as it holds that the defendant has no right to accompany a jury on a view, is *obiter dictum*. This contention is unsound. The Court overruled the exceptions of the defendant in that case for two reasons: first, that the defendant had no right to accompany the jury on a view, that the question as to whether or not he should be permitted to do so was a matter resting within the sound discretion of the trial Court, and, second, that even if he had such a right he had waived it. Each of these reasons individually would furnish a sound basis for the decision of the Court. It is presumptuous to assert that the second reason in the decision was the one which actuated the decision and that the first was merely *obiter dictum*. The first line of reasoning formed the basis for the decision of the fundamental question—whether or not the right exists. The more natural analysis of the dual reasons advanced by the Court—if any such analysis of the decision is desirable or necessary—is that the basic reason represents the adjudication of the Court on the matter and that the second reason advanced by the Court is merely cumulative and essentially superfluous. The Supreme Judicial Court of Massachusetts evidently so construed the decision in the *Dascalakis* case when it dealt with the same subject-matter in the *Belenski* case, as, in the latter case, it categorically held that no right existed to enable the defendant to accompany the jury on a view and that the trial Court did not err in refusing to permit the defendant to be personally present during the taking of the view, quoting the *Dascalakis* case as authority for this statement of law.

The history of the law relative to the taking of jury views in criminal cases in Massachusetts is summarized in Norman & Houghton, Massachusetts Trial Evidence (2d ed.), §1519:

"It was at one time doubted if a view could be taken in a capital case because it was not in the presence of the accused (*Commonwealth* v. *Parker*, 2 Pick. 549). Later a view was granted on request of the jury, concurrence of counsel on both sides and the prisoner, but only the officers went with the jury and no one was allowed to speak to them (*Commonwealth* v. *Knapp*, 9 Pick. 496, 515). Later under authority of a statute (G.L. c. 234, §35) a view was allowed in a capital case without hesitation, with counsel of both sides present (*Commonwealth* v. *Webster*, 5 Cush. 295, 298) and this proceeding is now regarded as well established. But there can be no comment or discussion at the view and counsel may merely point out essential features. Refusal to allow the defendant to accompany the jury is no violation of his constitutional right to meet the witnesses against him face to face or of his statutory right to be personally present during the trial (*Commonwealth* v. *Dascalakis*, 246 Mass. 1213)."

The petitioner has devoted considerable effort in an attempt to show that the recent decisions of the Supreme Judicial Court of Massachusetts in the *Dascalakis*, *Belenski* and *Snyder* cases were based on a misconception of the law and practice as existing in Massachusetts prior to the *Dascalakis* decision in 1922. Argument along this line is not proper in the present proceedings. These decisions of the Massachusetts Supreme Judicial Court must be considered by this Honorable Court in this proceeding as being the law of the Commonwealth of Massachusetts on the subject.

"Whether the state court erred in its construction of the state constitution and statutes . . . is not a federal question. We are bound by the construction which the state court gives to its own constitution and statutes." *West* v. *Louisiana*, 194 U.S. 258, 261.

"He [plaintiff] seems to make an issue with the court of appeals of the state upon the law of the state and to contend that the court erred in the interpretation and application of that law. This contention encounters the ruling in *In re Converse,* 137 U. S. 624, 631, and other cases which hold that 'a state cannot be deemed guilty of a violation of its obligations under the constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.'

"We cannot assume error in the decision of the Court of Appeals. We accept it, as we are bound to do, as a correct exposition of the law of the State—common, statutory and constitutional. Our inquiry can only be, did the state law as applied afford plaintiff in error due process as those words are used in the Fourteenth Amendment?" *Howard* v. *Kentucky,* 200 U.S. 164, 173.

THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS AS SET FORTH IN THE STATUTES OF SAID COMMONWEALTH AND THE DECISIONS OF THE SUPREME JUDICIAL COURT OF SAID COMMONWEALTH DO NOT CONSTITUTE A VIOLATION OF ANY RIGHT OF A DEFENDANT TO MEET WITNESSES FACE TO FACE OR TO BE PRESENT DURING THE ENTIRE TRIAL FOR A FELONY.

The so-called right of a defendant to be confronted with the witnesses against him which was perpetuated by the Constitution of the United States in so far as it affects the federal Courts and by the Constitutions of most all states, including Massachusetts, in so far as it affects procedure in the state Courts was "designed to prevent secret trials in which the accused was often arrested and executed without a hearing, and without any knowledge as to who were his accusers, or the evidence upon which they relied" (*People* v. *Thorn,* 156 N.Y. 286, 42 L.R.A. 368, 388). The main and essential purposes sought to be accomplished by the rule of confrontation was to secure for the defendant

the opportunity of cross-examination. The defendant "demands confrontation not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining of immediate answers" (Wigmore on Evidence (2d ed.), §1395). The statutes and constitutional provisions establishing the right of confrontation are intended "to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions of *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination" (*Dowdell* v. *United States,* 221 U.S. 325, 330, citing *Mattox* v. *United States,* 156 U.S. 237, 242; *Kirby* v. *United States,* 174 U.S. 47, 55; Wigmore on Evidence, vol. III, §§ 1396, 1397).

As a right primarily designed to insure cross-examination the right of confrontation is limited in application to witnesses or testimonial evidence. It does not extend to the kind of evidence adduced at a view taken by a jury, classified by Wigmore (on Evidence (2d ed.), §1803) as "autoptic proference, real evidence, or the tribunal's observance of the thing itself." Cross-examination of this type of evidence is to no purpose. The function of cross-examination is to ascertain in detail the elements of weakness that detract from the trustworthiness of a person's statement. Where human credit is not involved, cross-examination has no place. How can the view be cross-examined? The basic reason for the rule being the right of cross-examination, the rule has no application in cases where cross-examination is not possible—as in the instant case.

It is admitted that a view is evidence in the sense that it may be and properly should be considered by the jury in

their deliberations. Its chief function, however, is to enable the jury to better understand the testimony which has or may be introduced during the course of the trial. No witnesses are heard on a view. There may be no comment or discussion. The jury may simply use their eyes and their attention may be directed to particular portions of the view by counsel who are permitted to accompany them. To say that merely because a view is evidence the defendant must be present is fallacious and unsound. The right to meet witnesses face to face is limited to testimonial evidence introduced by witnesses who may be cross-examined. To call a view the giving of evidence by so-called "dumb witnesses" is merely employing a legal fiction in an effort to reach an unsound result. The proper construction of the defendant's right is as determined by the Supreme Judicial Court of Massachusetts—that he has the right to be present when testimony is taken against him, but that this right does not extend wherever evidence, particularly evidence of the type represented by a view, is adduced.

Another argument advanced for the proposition that evidence of the type adduced at a view is not within the contemplation of the defendant's right of confrontation is summarized in the case of *People* v. *Thorn*, 156 N.Y. 286, 42 L.R.A. 368, 389, as follows:

> "If seeing the locality is the taking of evidence in one case, it must be in another. If viewing the locality during the trial is the taking of testimony, why is not the seeing of the locality before the trial the taking of testimony? It often occurs that crimes are committed in public places, familiar to the greater portion of the inhabitants of a county, where it would be difficult, if not impossible, to procure a jury which had not seen the locality time and time again. Such persons, having seen the locality, and being familiar with it, could, if they were sitting upon a jury, readily determine whether a witness was accurately describing the place. Their

knowledge of the locality would constantly operate upon their minds during the trial in determining the force and effect which should be given to the testimony. If seeing is the taking of evidence, it would follow in every case that a juror who had seen and was familiar with the locality would be incompetent to sit as a juror, for he would have taken testimony in the absence of the accused, with which he had never been confronted, or had an opportunity to explain. To illustrate further: In front of this capitol, in the city of Albany, there is a park. On the opposite side of the park stands the courthouse. Should a felony be committed in the park, the accused could not well be brought to trial for the reason that every juror summoned in the case necessarily would see and view the locality every time he entered or departed from the courthouse. These are some of the absurd results which would naturally follow the construction contended for. Our minds do not incline that way. Every reasonable safeguard provided by the Constitution or the Bill of Rights for the protection of persons accused of crime should be scrupulously recognized and preserved by the courts; but we should not attempt to deprive the jury of the means of determining the truth or falsity of the testimony of witnesses, or to so surround criminal trials with technical and profitless restrictions as to make it difficult, if not impossible, to reach a verdict that can be upheld. It appears to us that the more rational and reasonable construction to be given to the provisions of the section is that the view is not the taking of testimony within the meaning of the Bill of Rights; but that the sole purpose and object of the view is to enable the jurors to more accurately understand and more fully appreciate the testimony of witnesses given before them. The wise and beneficent object of the statute should not be lost sight of. Trial judges should be careful to see that

the purpose of the statute is not departed from, and the view used for other purposes than that contemplated."

The second right which the petitioner contends is violated by the refusal to allow him to attend the view in person with the jury is the right of a defendant on trial for a felony to be present at all stages of his trial. The answer to this contention is that the view is not a part of the trial. The place of the trial is not changed while the view is being taken. The trial is merely suspended. The trial could not take place in the absence of the judge, yet the provisions of the Massachusetts statutes do not require the judge to attend upon the jury during the time that it is inspecting the premises. It is true that the judge was physically present himself at the view in the present case. His presence, however, was purely voluntary and not necessary to the validity of the view. Whether he should or should not accompany the jury rested within his sound discretion. In fact, the presence of the presiding justice at a view is unusual in Massachusetts practice. In the *Dascalakis* case, which first definitely settled the law in Massachusetts that the defendant has no right to accompany the jury on view, the judge did not superintend the view by the jury. The mere voluntary presence of the presiding justice at the view in this case did not change the nature of the proceedings. It did not thereby make the view an integral part of the trial. As the presence of the judge is necessary at all stages of the trial, and as the presence of the judge is not required at the view, it follows that the view is not a part of the trial, but is, as termed by the Supreme Judicial Court of Massachusetts, a temporary suspension of the trial.

Admitting, however, for the moment that the view is a part of the trial, it still does not follow that the defendant has a right to be present. The application of the rule that the defendant has a right to be present at all stages of the

trial must be limited to those stages of the trial where there is an inherent necessity for his presence. It cannot be seriously advanced by any one that the defendant has the right to be present during the deliberations of the jury. Yet the deliberations of the jury are as much a part of the trial as the taking of the view. It has been frequently held that the defendant has no right to be present during the hearing of exceptions on appeal, even where the Appellate Court enters final judgment, nor in the trial Court when the rescript is received by the Court and judgment and sentence affirmed. *Schwab v. Berggren,* 143 U.S. 444; *Fielden* v. *Illinois,* 143 U.S. 452.

What was the inherent necessity for the defendant's presence at the view? The defendant, if present, could not lawfully ask questions nor make statements. The sole value of his presence would lie in the opportunity to see that nothing irregular was done and to obtain such a knowledge of what was done as would assist him in the subsequent conduct of the trial. But he may do all these things through his counsel, who is permitted to accompany the jury in the capacity as shower. Counsel points out such parts as the accused has directed, and does so with reference to the forthcoming testimony. Counsel is in a position to observe all that is done and to see that no irregularities are committed on the view. Counsel is in a position to make all observations as may be useful to the defendant. It must also be borne in mind that the defendant was not denied the right to visit the scene of the view in order to make observations in the company of his counsel at some time other than the visit by the jury. This privilege was not requested. At such a visit the defendant could have personally made such observations as deemed necessary for the preparation of his defense. If the Court denied him the right to visit the scene of the alleged crime in the company of his counsel, or if the Court denied to counsel the right to accompany the jury on the view, it may well be that the defendant's rights

would have been substantially prejudiced. But counsel for the defendant was present and there was nothing that could have been accomplished by the defendant personally in addition to that which his counsel could and, in this case, did accomplish for him.

It must also be borne in mind that the defendant had no right to have a view taken. Whether or not there shall be a view in a criminal case rests within the sound discretion of the trial judge. There was no power at common law on the part of the Court to order a view unless possibly with the consent of all parties. The provisions of law relative to views are purely statutory. Not only is the determination of whether or not a view shall be taken within the discretion of the trial judge, but the details of the procedure to be followed at the view are to be determined within his sound discretion. Whether or not the trial judge shall be present in person, whether or not the proceedings at the view shall be taken down stenographically, whether the view shall be taken at the commencement of the trial, during the trial or at the termination of the trial—the determination of these and all other administrative and procedural details rests within the sound discretion of the Court. The only objection the defendant can make is that his rights shall not be substantially prejudiced by the procedure as thus determined by the Court. Both the right to and the procedure of a view are statutory and discretionary with the Court. No substantial prejudice to the rights of the defendant in the exercise of that discretion has been shown by the defendant. No actual damage to the defendant in the exercise of that discretion in the present case has ever been asserted by the defendant. If actual damage were asserted by the defendant at any time during the course of the trial, the same could have been rectified by the trial judge. If anything prejudicial had actually occurred at the view, the same, if properly called to the attention of the trial judge, could have been remedied during the trial, or,

if necessary, by a second view. No actual prejudice or injury was claimed. Where, as in the present case, the defendant has no right to a view, and no right to any particular procedure in the taking of the view, he should not be permitted to complain either of the view or of the procedure unless he can show an actual and substantial prejudice.

The decisions of the various Courts of last resort of the different states on the right of an accused to be present in person at the taking of a view by a jury are in direct conflict. Practically all the cases in point are collected in notes in 42 L.R.A. 368, 30 A.L.R. 1357, Wigmore on Evidence (2d ed.), note following §1803 in vol. III, pages 835 and 836. Some of the leading decisions of other state Courts supporting the view as set forth by the Supreme Judicial Court of Massachusetts are the following:

People v. *Thorn,* 156 N.Y. 286, 42 L.R.A. 368.
State v. *Much* (Wash.), 287 Pac. 57, 61.
State v. *Lee Doon,* 7 Wash. 308, 34 Pac. 1103.
State v. *Reed,* 3 Idaho, 754, 35 Pac. 706.
Shular v. *State,* 105 Ind. 289, 293, 4 N.E. 870.
State v. *Rogers,* 145 Minn. 303, 177 N.W. 358.
State v. *Chu Gong,* 17 Ore. 635, 636, 21 Pac. 882.
State v. *Mortenson,* 26 Utah, 312, 73 Pac. 562.
Close v. *Samm,* 27 Iowa, 503.

EVEN IF THE PETITIONER HAS BEEN DEPRIVED OF THE RIGHT TO CONFRONT WITNESSES AND BEING PRESENT AT ALL STAGES DURING THE TRIAL, THIS DEPRIVATION IN THE PRESENT CASE IS NOT AN INFRINGEMENT OF HIS RIGHT TO DUE PROCESS OF LAW WITHIN THE MEANING OF THAT TERM AS USED IN THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The petitioner in the present case cannot object to any alleged violation of rights set forth in the Sixth Amendment

of the Constitution of the United States, as that amendment applies only to procedure in the federal Courts.

Twining v. *New Jersey*, 211 U.S. 78, 93.
Barrington v. *Missouri*, 205 U.S. 483.
Brown v. *New Jersey*, 175 U.S. 172.
Spies v. *Illinois*, 123 U.S. 131.
Barron v. *Baltimore*, 7 Pet. 243.

The objection of the petitioner to any alleged violation of right must be limited to a consideration of whether the right allegedly violated falls within the purview of the term "due process of law" as employed in the Fourteenth Amendment to the Constitution of the United States. Is the right of confrontation of witnesses and the presence of the defendant at all stages of a trial for a felony, as applicable to a view by a jury during the course of the proceedings—

> "of such a nature that it must be included in the conception of due process [?] Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law. In approaching such a question it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that in our peculiar dual form of government nothing is more fundamental than the full power of the state to order its own affairs and govern its own people except so far as the Federal Constitution expressly or by fair implication has with-

drawn that power." *Twining* v. *New Jersey*, 211 U.S. 78, 106.

"Some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226." *Twining* v. *New Jersey*, 211 U.S. 78, 99.

We then come to the consideration of what rights are so fundamentally ingrained in the "principles of liberty and justice which inhere in the very idea of free government" that they may be said to be included within the term "due process of law" as used in the Fourteenth Amendment to the Constitution. Is the alleged right of a defendant to be present in person during the taking of a view by a jury such a right? In the case of *Twining* v. *New Jersey*, 211 U.S. 78, this Honorable Court sought to review all prior decisions bearing upon this subject. It was therein pointed out that up to that time only two rights had been recognized as being of such a fundamental nature that they were included within the intent of the due-process clause of the Fourteenth Amendment: (1) The right to a person to be heard only before a Court having jurisdiction, which principle was set forth in the previous decisions of *Pennoyer* v. *Neff*, 95 U.S. 714; *Scott* v. *McNeal*, 154 U.S. 34; and *Old Wayne Life Association* v. *McDonough*, 204 U.S. 8; and, (2) The right of notice and opportunity for a hearing, which principle was set forth in the previous decisions of *Hovey* v. *Elliott*, 167 U.S. 409, and *Roller* v. *Holly*, 176 U.S. 398. All other claims of right raised and considered previous to the *Twining* case had been held not to be of such a fundamental nature as to be included within the purview of the term "due process of law" as contained in the Fourteenth Amendment.

"Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law

established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law."

Twining v. *New Jersey*, 211 U.S. 78, at 110.

The cases wherein the Court determined alleged rights not to be within the protection of the Fourteenth Amendment as enumerated in the *Twining* case are as follows:

Walker v. *Sauvinet*, 92 U.S. 90:

(The petitioner objected to an alleged deprivation of the right to a trial by jury in civil cases.)

Caldwell v. *Texas*, 137 U.S. 692:

(The petitioner objected to the form of an indictment.)

Leeper v. *Texas*, 139 U.S. 462:

(The petitioner objected to the qualifications of a juror and certain evidence admitted at his trial, etc.)

Hallinger v. *Davis*, 146 U.S. 314:

(The petitioner objected to the New Jersey law which permitted a defendant to plead guilty to murder and the court without a jury to hear evidence and determine the degree of murder.)

McNulty v. *California*, 149 U.S. 645:

(The petitioner objected to a decision of the California court ordering that he be punished under a law existing at the time of the com-

mission of a crime although the law had been changed during the pendency of his appeal to the state appellate court.)

McKane v. *Durston*, 153 U.S. 684:

(The petitioner objected to the operation of a New York statute which provided that a defendant may be freed upon bail pending appeal only if the trial judge certifies that there is a reasonable doubt relative to verdict.)

Iowa Central v. *Iowa*, 160 U.S. 389:

(The petitioner objected to operation of the Iowa statute which permitted summary entry of judgment upon plaintiff's motion on the ground that the answer did not set up a legal defense.)

Lowe v. *Kansas*, 163 U.S. 81:

(The petitioner objected to operation of a Kansas statute which permitted the assessment of costs against the prosecutor where the defendant was found not guilty of a charge of criminal libel and the jury found that the proceedings were instituted without probable cause.)

Allen v. *Georgia*, 166 U.S. 138:

(The petitioner objected to the action of the Supreme Court of Georgia in dismissing his appeal because he had escaped from custody pending the appeal and was a fugitive from justice.)

Hodgson v. *Vermont*, 168 U.S. 262:

(The petitioner objected to the form of information employed in the Vermont practice.)

Brown v. *New Jersey*, 175 U.S. 172:

(The petitioner objected to the operation of a New Jersey statute which permitted the use of struck juries within the discretion of the trial judge.)

Bolln v. *Nebraska*, 176 U.S. 83:

(The petitioner objected to the use of information rather than indictment in criminal proceedings and to the refusal of a jury trial on his plea in abatement.)

Maxwell v. *Dow*, 176 U.S. 581:

(The petitioner objected to the state statute allowing trial in criminal cases by a jury of less than twelve persons.)

Simon v. *Craft*, 182 U.S. 427:

(The petitioner objected to the Louisiana statute relative to lunacy proceedings.)

West v. *Louisiana*, 194 U.S. 258:

(The petitioner objected to the use in evidence at his trial of a deposition taken in a lower court examination where there had been opportunity for cross-examination and the witness was absent from the state at the time the deposition was received in evidence.)

Marvin v. *Trout*, 199 U.S. 212:

(The petitioner objected to the operation of an Ohio statute which created a lien for moneys lost in gambling upon the premises used if said usage was with the knowledge of the owner.)

Rogers v. *Peck*, 199 U.S. 425:

(The petitioner objected to the procedure employed in Vermont relative to the time of

execution of a murder sentence when a reprieve is issued by the governor.)

Howard v. *Kentucky*, 200 U.S. 164:

(The petitioner objected to the fact that he was not present while additional instructions were given by the judge to the jury during his trial for a felony.)

Rawlins v. *Georgia*, 201 U.S. 638:

(The petitioner objected to the exclusion of certain classes of persons from the jury list, said exclusion not being based on race discrimination.)

Felts v. *Murphy*, 201 U.S. 123:

(The petitioner objected to the proceedings at his trial on the ground that he was deaf and had heard no part of the evidence during the trial.)

In discussing these cases the Court said:

"Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence are complied with." *Twining* v. *New Jersey*, 211 U.S. 78, 111.

To this list the Court in the *Twining* case added the right to protection against self-incrimination as being a right not within the protection of the Fourteenth Amendment.

The Court in the *Twining* case did not, however, close the door to any future determination assigning any further rights to the class of rights which is protected by the Fourteenth Amendment. It refused to set forth a conclusive and binding definition of what rights were included within the term "due process of law," preferring that this class be developed as the occasion should arise.

> "Few phrases of the law are so elusive of exact apprehension as this. Doubtless the difficulties of ascertaining its connotation have been increased in American jurisprudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power. This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise." *Twining* v. *New Jersey,* 211 U.S. 78, 100.

In the case of *Powell* v. *Alabama,* 287 U.S. 45, this Honorable Court added the right to an opportunity for proper representation by counsel in the preparation and trial of the defense of a criminal charged with a capital offense to the class of rights which are included within the term "due process of law."

It is the contention of the respondent in this action that the refusal of the trial judge to permit the petitioner to accompany the jury on the view, if it be a violation of any right of the petitioner at all—and it has been contended in the first portion of this brief that there was no violation of any right—is not a violation of that class of rights which is insured to the petitioner by the Fourteenth Amendment, but rather the violation of a right which does not come within

the protection of the Fourteenth Amendment and is similar to the rights claimed in the long list of cases set forth in the decision in the *Twining* case.

The cases previously decided by this Honorable Court which are most closely analogous to the present case are those of *Howard* v. *Kentucky,* 200 U.S. 164, and *Brown* v. *New Jersey,* 175 U.S. 172.

In the case of *Howard* v. *Kentucky,* 200 U.S. 164, the defendant objected to the fact that the trial Court gave additional instructions to the jury in his absence. In disposing of this objection this Honorable Court said:

> "It is manifest, therefore, that it is the law of Kentucky that occasional absence of the accused from the trial, from which no injury results to his substantial rights, is not reversible error. And we think, in applying that rule to the case at bar, plaintiff in error was not deprived of due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States." *Howard* v. *Kentucky,* 200 U.S. 164, 175.

The presence of the petitioner at the view in the present case was no more a fundamental necessity to the rights of a defendant than the presence of the defendant at the stage of the proceedings set forth in the *Howard* case.

In the case of *Brown* v. *New Jersey,* 175 U.S. 172, the defendant objected to the trial judge in his discretion ordering a "struck jury," rather than drawing a jury under the usual provisions of law. In disposing of this objection this Honorable Court said:

> "There is no mere arbitrary power in this respect, any more than in the granting or refusing of a continuance. The fact that in one case the plaintiff or defendant is awarded a continuance and in another is refused does not make in either a denial of the equal protection of the laws. That in any given case the dis-

> cretion of the court in awarding a trial by a struck jury was improperly exercised may perhaps present a matter for consideration on appeal, but it amounts to nothing more.''

The petitioner in this case had no more right to a view by the jury nor of a view according to any procedure other than the procedure set forth by the trial judge in the exercise of his discretion than the defendant in the *Brown* case had relative to the procedure of drawing the jury. In neither case has he a valid objection to the exercise of the discretion vested in the trial judge unless he can show a substantial and an actual injury.

The petitioner has cited several decisions of this Honorable Court in support of his contention that his constitutional rights have been infringed. None of the cases thus cited deal with constitutional rights as guaranteed by the Fourteenth Amendment.

The case of *Lewis* v. *United States,* 146 U.S. 370, was an appeal from the judgment of an inferior Court of the United States. The question at issue was whether the prisoner had the right to be present when challenges of jurors were being made. The Court held that the practice in federal Courts must not conflict with or abridge the right of the prisoner as it exists at common law. The Court did not consider the effect of the Fourteenth Amendment to the Constitution. The decision further specifically held that the right to be brought face to face with jurors when challenges are made is a substantial right of the prisoner. This case is differentiable from the present case on several grounds: (1) The right in the *Lewis* case was a common-law right. The right in the present case relates to a statutory procedure. (2) The violation of the right in the *Lewis* case was a violation of the laws of the United States. The alleged violation of right in the present case is allegedly a violation of the due-process clause of the Fourteenth Amendment. (3) The right

in the *Lewis* case was a substantial right, and its violation resulted in substantial and actual injury. In the present case the injury claimed by the petitioner is neither substantial nor actual.

The same differentiations may be made between the present case and the case of *Hopt* v. *Utah,* 110 U.S. 574. That case was a review of the decision of a territorial Court, and the decision concerned itself principally with the construction of the law of the territory. The possible effect of the Fourteenth Amendment to the Constitution was not considered. The absence of the prisoner complained of in that case was absence at the time of examination of jurors during the period of challenging. It should also be noted that in the *Hopt* case the Court decided that the right of the defendant to be present was so substantial that it could not be waived. The petitioner in the present case admits that the right of a defendant to be present at a jury view may be waived.

> "That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. . . . Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential that he shall be personally present at the trial, that is, at every stage of the trial when *his substantial rights may be affected* by the proceedings against him." (Italics ours.)
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> *Hopt* v. *Utah,* 110 U.S. 574, 579.

In the case of *Schwab* v. *Berggren,* 143 U.S. 444, the Court held that the presence of the defendant is not necessary when the Appellate Court of a state affirms sentence—on the ground that his presence is not necessary where his sub-

stantial interests as a defendant are not involved. In the case of *Dowdell* v. *United States,* 221 U.S. 325, the Court held that the defendant could not object to his absence when the judge and clerk were making up the record of the case for the Appellate Court. This case was an appeal from the Philippine Islands. Neither of these two cases cited by the petitioner is relevant to the question at issue in the present case.

The inapplicability of the *Lewis* and *Hopt* cases to a question arising from a practice of a state Court was specifically pointed out in the case of *Frank* v. *Mangum,* 237 U.S. 309, 340:

> "It is insisted that the enforced absence of Frank at that time was not only a deprivation of trial by jury, but was equally a deprivation of due process of law within the meaning of the Amendment, in that it took from him at a critical stage of the proceeding the right or opportunity to be heard. But repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. Indictment by grand jury is not essential to due process (*Hurtado* v. *California,* 110 U.S. 516, 532, 538; *Lem Woon* v. *Oregon,* 229 U.S. 586, 589, and cases cited). Trial by jury is not essential to it, either in civil cases (*Walker* v. *Sauvinet,* 92 U.S. 90), or in criminal (*Hallinger* v. *Davis,* 146 U.S. 314, 324; *Maxwell* v. *Dow,* 176 U.S. 581, 594, 602, 604).
>
> "It is argued that a State may not, while providing for trial by jury, permit the accused to waive the right to be heard in the mode characteristic of such trial, including the presence of the prisoner up to and at the time of the rendition of the verdict. But the cases cited

do not support this contention. In *Hopt* v. *Utah*, 110 U.S. 574, 578 (principally relied upon), the court had under review a conviction in a territorial court after a trial subject to the local code of criminal procedure, which declared: If 'the indictment is for a felony, the defendant *must be* personally present at the trial.' The judgment was reversed because of the action of the trial court in permitting certain challenges to jurors, based upon the ground of bias, to be tried out of the presence of the court, the defendant and his counsel. The ground of the decision of this court was the violation of the plain mandate of the local statute; and the power of the accused or his counsel to dispense with the requirement as to his personal presence was denied on the ground that his life could not be lawfully taken except in the mode prescribed by law. No other question was involved. See *Diaz* v. *United States*, 223 U.S. 442, 455, 458.

"The distinction between what the common law requires with respect to trial by jury in criminal cases, and what the States may enact without contravening the 'due process' clause of the Fourteenth Amendment, is very clearly evidenced by *Hallinger* v. *Davis*, 146 U.S. 314, and *Lewis* v. *United States* 146 U.S. 370, which were under consideration by the court at the same time, both opinions being written by Mr. Justice Shiras. In the *Lewis Case*, which was a conviction of murder in a Circuit Court of the United States, the trial practice being regulated by the common law, it was held to be a leading principle, pervading the entire law of criminal procedure, that after indictment nothing should be done in the absence of the prisoner; that the making of challenges is an essential part of the trial, and it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time the challenges were made; and that in the absence of a statute, this

right as it existed at common law must not be abridged. But in the *Hallinger Case,* where a State by legislative enactment had permitted one charged with a capital offense to waive a trial by jury and elect to be tried by the court, it was held that this method of procedure did not conflict with the Fourteenth Amendment. So in *Howard* v. *Kentucky,* 200 U.S. 164, 175—a case closely in point upon the question now presented—this court, finding that by the law of the State an occasional absence of the accused from the trial, from which no injury resulted to his substantial rights, was not deemed material error, held that the application of this rule of law did not amount to a denial of due process within the meaning of the Fourteenth Amendment.

* * * * * * * *

"Our conclusion upon this branch of the case is, that the practice established in the criminal courts of Georgia: that a defendant may waive his right to be present when the jury renders its verdict, and that such waiver may be given after as well as before the event, and is to be inferred from the making of a motion for new trial upon other grounds alone, when the facts respecting the reception of the verdict are within the prisoner's knowledge at the time of making that motion; is a regulation of criminal procedure that it is within the authority of the State to adopt. In adopting it, the State declares in effect, as it reasonably may declare, that the right of the accused to be present at the reception of the verdict is but an incident of the right of trial by jury; and since the State may, without infringing the Fourteenth Amendment, abolish trial by jury, it may limit the effect to be given to an error respecting one of the incidents of such trial. The presence of the prisoner when the verdict is rendered is not so essential a part of the hearing that a rule of practice permitting the accused to waive it and holding

him bound by the waiver amounts to a deprivation of 'due process of law.'"

It is to be noted that, although there was a strong dissenting opinion in the *Frank* case by Mr. Justice Holmes and Mr. Justice Hughes, the dissenting justices were in accord with the views of the majority of the Court in the particular matters material to the present case (p. 346):

> "We lay on one side the question whether the petitioner could or did waive his right to be present at the polling of the jury. That question was apparent in the form of the trial and was raised by the application for a writ of error; and although after the application to the full Court we thought that the writ ought to be granted, we never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States."

THERE WAS IN THIS CASE NO INFRINGEMENT OF ANY RIGHTS OF THE PETITIONER GUARANTEED TO HIM UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION BECAUSE HE DID NOT SUSTAIN ANY SUBSTANTIAL OR ACTUAL INJURY BY THE ACTION OF THE TRIAL JUDGE.

The due-process clause of the Fourteenth Amendment was designed solely to protect substantial and fundamental rights of a defendant. In the case of *Howard* v. *Kentucky*, 200 U.S. 164, 173, this Honorable Court said: "It may be admitted that the words 'due process', as used in the Fourteenth Amendment, protect fundamental rights."

The right which the Court held not to be a substantial or fundamental right in the *Howard* case was the right of a defendant to be present at all stages of the trial (in the particular case, while the judge was giving additional instructions to the jury). The Kentucky Court of last resort

held that, although the defendant had a constitutional right (under the Kentucky Constitution) to be present at all stages of the trial, any violation of this right was not reversible error when no actual injury resulted to the defendant's substantial rights. This Honorable Court held that, inasmuch as no substantial injury resulted to the defendant, the alleged violation of rights of the defendant and the application of the rule followed by the Kentucky Courts that no new trial would be granted unless there was an actual injury caused by the alleged violation of the defendant's constitutional rights did not amount to a denial of due process within the meaning of the Fourteenth Amendment. This case becomes directly in point with the present case, as the Kentucky Courts have considered the absence of a defendant while the jury is taking a view in exactly the same category as the absence of the defendant under the circumstances set forth in the *Howard* case. See *Rutherford* v. *Commonwealth*, 78 Ky. 639, in which the Court held that, although the defendant had a constitutional right (under Kentucky Constitution) to accompany the jury on the view, the refusal of the trial judge to allow him to so accompany the jury was not reversible error where the defendant had suffered no substantial or actual injury therefrom.

In the present case there was no substantial or actual injury to any fundamental right possessed by the petitioner. Therefore, the practice, as followed by the Massachusetts Courts, did not amount to a denial of due process.

The claim of substantial injury advanced by the petitioner is that he was prejudiced in his preparation of the case because of the failure to permit him to be present in person while the jury took the view of the premises where the crime was committed. The only function he could have performed at the view would have been to remind his counsel of details to call to the attention of the jury. He himself could not have uttered a single word to the jury. If the petitioner believed that his personal assistance in reminding his coun-

sel of matters relating to the case was necessary for the proper preparation and presentation of his defense, there were ways in which his personal aid in this matter could have been accomplished other than allowing him to attend the taking of the view in person with the jury.

(1) Counsel for the petitioner was aware of the settled law of the Commonwealth of Massachusetts, as decided by the Supreme Judicial Court in the *Dascalakis* and *Belenski* cases, to the effect that it was a matter within the sound discretion of the trial judge whether or not to permit the accused to accompany the jury in person to the view. He knew that the crime for which the accused was about to be placed on trial was a brutal killing. He knew that there was considerable public feeling in the community against the defendant, as is quite common when persons are placed upon trial accused of participating in a cold-blooded holdup and murder. He knew that the place where the view was to be held was a public place, easily accessible to spectators. He knew that a crowd of onlookers might well gather around the premises at the time the jury was taking the view, drawn by the excitement of such a proceeding. He at least claimed that the defendant was not of sound mind. Counsel for the defendant certainly should have known—the inference is almost irresistible that he did know—that there was a strong probability at least, if not a practicable certainty, that, in view of all the circumstances and conditions as enumerated above, the trial judge would exercise the discretion vested in him by the laws of the Commonwealth and refuse to permit the accused to be with the jury in person at the taking of the view—not only because of the fear of a possible general disorder, but for the protection of the best interests of the accused, and to eliminate the possibility of any expression of hostility, animosity or disfavor toward the accused by such spectators as would naturally assemble at the scene—which expressions, committed in the presence of the jury, would most certainly have been prejudicial to the best

interests of the accused. If there were any matters which the accused desired that his counsel call to the attention of the jury on the view which could only be determined by his personally inspecting the premises, a request could have been made of the Court that the accused be permitted to accompany his counsel to the premises on some occasion before the visit of the jury. On such a visit he could have called to the attention of his counsel such matters as he thought might be material. No such request was ever made. Counsel for the accused was appointed by the Court a considerable period of time before the trial. If the presence of the accused at the scene of the crime was important to the proper preparation of his defense to the charge of crime, it certainly appears that such a request would have been made. The time that a jury is taking a view is hardly the appropriate and proper time for a client to advise his counsel relative to matters essential to his defense. Clearly, if any enlightenment of counsel by the accused in person was necessary relative to matters at the scene of the crime, it should have occurred prior to the taking of the view by the jury—particularly in view of the probability, almost akin to certainty, which was or should have been known to counsel, that the accused would not be permitted to accompany the jury on the view. Knowing the high calibre and great ability of counsel for the accused, the inference is almost irresistible that no such enlightenment was considered necessary—for, if there were any substantial need for the presence of the defendant at the scene of the crime, either as an aid in the preparation of the case or to enable counsel to properly point out necessary matters at the scene of the view, a request would most certainly have been made that the accused be permitted to visit the scene of the crime in the company of his counsel prior to the taking of the view—and in all probability such a request, if seasonably made, would have been readily granted.

(2) At the same time as he denied the accused the right to accompany the jury on the view, the trial judge intimated that, if requested, he would permit the accused to visit the scene of the crime with his counsel on some other occasion. No request along the lines of this intimation was ever made. All matters of procedure relative to the holding of a view are entirely within the discretion of the trial judge. It is not uncommon, particularly in a trial of considerable duration, for a jury to take more than one view, often viewing the premises in question at the commencement of the proceedings and again at or near the termination, usually after the completion of the testimony of the witnesses and before argument of counsel or between the time of argument by counsel and the charge by the Court. If any substantial right of the accused was substantially injured by the refusal of the Court to permit him to accompany the jury on the view at the commencement of the trial, that injury could have been remedied by a second view. The only conceivable prejudice that the accused could have suffered was by the failure of his counsel to call the jury's particular attention to some particular object at the scene of the view. The entire scene of the view received the jury's general attention. Whether or not such an omission did occur could have been easily ascertained by counsel for the accused by requesting permission of the Court to visit the scene of the view with the accused—and, once ascertained, this omission could easily have been rectified by the taking of a second view. No request that the accused be permitted to visit the scene of the crime with his counsel was made. No request for a second view was made. Again, it is hardly conceivable that counsel of the ability and astuteness possessed and displayed by counsel for the defendant in this case could have failed to avail himself of any opportunity to correct an injury to any substantial right of the accused, if any such injury existed. Under all the circumstances, the failure of counsel to avail himself of such an opportunity is tantamount to an admis-

sion that no substantial right of the accused was in fact impaired by the action of the trial judge in refusing the accused the privilege of accompanying the jury on the view.

The Petitioner was Not Denied the Effective Assistance of Counsel.

The petitioner claims that he was denied the effective aid of counsel in the preparation of his defense, in contravention of his rights as allegedly determined by this Honorable Court in the case of *Powell* v. *Alabama*, 53 S. Ct. 55.

It should first be noted that the decision in the *Powell* case was expressly limited to the facts as existing in relation to that particular case (p. 65):

> "But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain im-

> mutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' Holden v. Hardy, supra. In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel."

The short answer to this contention of the petitioner is that the ruling of the trial judge refusing to allow the defendant to accompany the jury on the view did not affect the preparation of the petitioner's defense. The purpose of a view by a jury is to enable the jury to more easily understand the testimonial evidence offered during the course of the trial. It is not the proper time "to acquaint counsel with facts necessary to his defence." Any consultation between client and attorney relative to matters of defense should not be conducted in the presence of the jury. That the mere denial to the petitioner of the right to accompany the jury on the view, considered together with the fact that the petitioner never sought any opportunity to confer with counsel at the scene of the crime other than at the time the jury was taking a view, was not a substantial nor an actual injury to the petitioner's alleged right of effective assistance by counsel in the preparation of his defense, is adequately demonstrated by the discussion in the preceding section of this brief.

The Petitioner was Not Denied the Equal Protection of the Laws.

The contention of the petitioner that he was denied the equal protection of the laws is based upon the fallacious premise that, had he been out on bail, he would have been free to accompany the jury on the view. The procedure at the view was, however, entirely within the discretion of the

trial judge. Even if he had been free on bail, the trial judge could have barred him from accompanying the jury on the view. His position relative to his right to accompany the jury on the view was no different because he was in custody than if he had been at liberty under bail—in either case it was a matter resting within the sound discretion of the trial judge.

Conclusion.

In conclusion the respondent respectfully submits:

1. No rights of the petitioner were impaired by the refusal of the trial judge to allow him to accompany the jury on the view.

2. Even if this ruling was an infringement of any of the petitioner's rights, the alleged violation of rights did not constitute an impairment of any of the rights guaranteed to the petitioner by the due-process clause of the Fourteenth Amendment.

3. There was no denial of due process to the petitioner, because he did not suffer any substantial or actual damage as the result of any ruling of the trial judge.

4. The petitioner was not denied the effective assistance of counsel nor the equal protection of the laws.

Respectfully submitted,

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